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Family law and national culture Arguing against the cultural constraints argument

Masha Antokolskaia*

Introduction

'Family laws are embedded in unique and cherished national cultural heritages of particular countries' – this is the core of the so-called 'cultural constraints argument'.¹ The 'Cultural constraints argument' further suggests that this cultural and historical diversity is unbridgeable and therefore family laws are not spontaneously converging and cannot be deliberately harmonised. Otto Kahn-Freund reflected upon the common negative attitude towards the harmonisation of family law, by proclaiming the unification of family law 'a hopeless quest'.² This scepticism was rooted in the alleged fundamental unsuitability of family law for harmonisation due to the strong cultural and historical constraints, resulting in the lack of shared values and objectives. The notion of the cultural and historical embedment of family law originates from family law scholars. As early as in the 1968, Wolfram Müller-Freienfels wrote, 'family law concepts are especially open to influence by moral, religious, political and psychological factors; family law tends to become introverted because historical, racial, social and religious considerations differ according to country and produce different family law systems'.³ Most scholars engaged in harmonisation activities in other areas of private law have rather uncritically adopted the same attitude. Even the political institutions of the EU have been susceptible to this assumption. For instance, the European Council has quite recently stated that family law is 'very heavily influenced by the culture and tradition of national (or even religious) legal systems, which could create a number of difficulties in the context of harmonisation'.⁴

Accordingly, family law has for quite some time been regarded as unsuitable for deliberate harmonisation, without substantial scrutiny of the merits of the cultural constraints argument.⁵

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1 On the use of this argument see, for instance: G. de Oliveira, 'A European Family Law? Play it again, and again ... Europe!', 2000 *Tijdschrift voor familie- en jeugdrecht*, pp. 272-277; M. Hohnerlein, 'Konturen eines einheitlichen europäischen Familien- und Kindschaftsrecht – die Rolle der Europäischen Menschenrechtskonvention', 2001 *European Legal Forum*, no. 4, p. 252.

2 O. Kahn-Freund, 'Common Law and Civil Law – Imaginary and Real Obstacles to Assimilation', in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe*, 1978, p. 141.

3 W. Müller-Freienfels, 'The Unification of Family Law', 1968 *The American Journal of Comparative Law*, p. 175.

4 Council report on the need to approximate Member States' legislation in civil matters of 16 November 2001, 13017/01 justciv 129, p. 114.

5 For instance I. Kon, *Sexual'naia kul'tura v Rossii* (Sexual Culture in Russia), 1997; T. Koopmans, 'Towards a New "Ius Commune"', in B. de Witte & C. Forder (eds.), *The common law of Europe and the future of legal education*, 1992, pp. 43-51; K. Kerameus, 'Problems of Drafting a European Civil Code', 1997 *European Review of Private Law*, no. 4, pp. 455-481, p. 479; G. Alpa, 'European Community Resolutions and the Codification of "Private Law"', 2000 *European Review of Private Law*, no. 2, p. 326; J. Basedow, 'Codification of Private Law in the European Union: the making of a Hybrid', 2001 *European Review of Private Law*, no. 1, pp. 35-37.

As a result, the issue of the harmonisation of family law has long remained on the fringes of the discussion surrounding harmonisation of private law.⁶

Nonetheless, since the late 1990s the attitude towards the harmonisation of family law has become increasingly, albeit it gradually, more positive.⁷ The most tangible result of this development was the establishment of the Commission on European Family Law (CEFL) in 2001, aimed at elaborating non-binding Principles for family law in Europe. However, in spite of the growing amount of literature⁸ and the thriving drafting activities of the CEFL, harmonisation of family law remains a highly controversial issue and the discussion whether it is at all possible is far from being closed case.⁹ The reason for this is that the cultural constraints argument has not been overcome, but rather circumvented.

The notion that family law is strongly embedded in national culture has long been taken for granted without having been analysed thoroughly by either proponents or opponents of the cultural constraints argument. Even those who try to put this argument into perspective have not investigated it in any depth. The most common counter-argument is that certain peculiarities of the family law of the country in question cannot be explained by cultural factors. For instance, Ewoud Hondius doubts that the fact that The Netherlands is the only European country that still has a total community of assets as the legal regime for matrimonial property could be explained by the particularities of Dutch national culture.¹⁰ Others point out that certain changes in long-standing family law concepts have not brought about any cultural shocks.¹¹ The most elaborate criticism thus far is that some culturally-imbedded rules do not coincide with the modern notion of human rights;¹² that tradition is not 'holy' and should not be protected at any rate; and that even culturally-laden family rules are not an end in themselves, but rather a means by which to promote a desired regulation of human relations.¹³

In my earlier work¹⁴ I tried to make a first step in the direction of a more fundamental qualification of the cultural constraints argument, by bringing to light the common historical roots of family law that all European countries have in common. This endeavour inspired me to undertake a five-year study into the convergence and divergence of family law in Europe.¹⁵ I was challenged by the idea of exploring the main objection to family law harmonisation, the so-called 'cultural constraints argument'. This study revealed that the 'cultural constraints argument' has a number of various dimensions. In this article, I will summarise my findings regarding one of its core dimensions: the cultural embedment of family law.

6 Rather illustrative in this respect is a remark by Ole Lando, the 'father' of the first harmonisation project, made in 2006: 'The family laws of the European Union are a fascinating subject. One would think that each of the laws reflect the national character, the dominant religion, the tradition, the family matters, which are linked to the economic and social conditions of each country. For these reasons I thought that there could never be any rapprochement of family laws and notably not in the laws of divorce. The more the laws are linked to persons and passions, I thought, the more they would differ and remain different.' O. Lando, 'Can Europe Build Unity of Civil Law Whilst Respecting Diversity?', 2006 *Europa e diritto privato*, no. 1, p. 8.

7 K. Boele-Woelki, 'Comparative Research-based Drafting of Principles of European Family Law', in M. Faure, et al. (eds.), *Towards a European Ius Commune in Legal Education and Research*, 2002, pp. 175-177; W. Pintens, 'Europeanisation of Family Law', in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, 2003, pp. 4 et seq.

8 D. Martiny, 'Is Unification of Family Law Feasible or Even Desirable?', in A. Hartkamp et al. (eds.), *Towards a European Civil Code*, 2004, pp. 328-333 and the CEFL website: <http://www2.law.uu.nl/priv/cefl/> under the rubric 'publications'.

9 Martiny, *supra* note 8, pp. 307-333.

10 E. Hondius, *Naar een Europees burgerlijk recht, preadvies Vereniging Burgerlijk recht*, 1993, p. 180.

11 The introduction in Belgian family law of the notion of *mater semper certa est*, is used as an example thereof, pp. 785-794. W. Pintens & C. Vanwinckelen, *Casebook European Family Law*, 2001, p. 15.

12 G.-R. de Groot, 'Op weg naar een Europees personen- en familierecht?', 1995 *Ars Aequi*, no.1, p. 29.

13 See for instance Pintens & Vanwinckelen, *supra* note 11, p. 15: '(...) law, even if imbedded in our culture, is primarily an instrument to regularize human relationships and is not a purpose in itself.'

14 M. Antokolskaia et al., *Naar een Europees Familierecht, Report for the Netherlands Comparative law Association*, 1999.

15 This study, financed by the Dutch Royal Academy of Sciences and Arts, resulted in a monograph *Harmonisation of Family Law in Europe: A Historical Perspective. A Tale of Two Millennia*, 2006.

1. Is family law embedded in unique national culture?

The assumptions constituting the cultural constraints argument can be summarised as follows. Firstly, it is suggested that laws are ingrained in the culture of the countries in which they operate. Secondly, it is assumed that each country has its own particular national culture that influences the respective law. Thirdly, it is presupposed that each of these national cultures is unique to the country concerned and that these national cultures are not moving any closer to one another. The final reckoning is that due to their embedment in the unique national cultures, laws are not converging spontaneously and cannot be harmonised deliberately.

Culture can be defined in many different ways. A general definition of culture could be that it is the 'heritage of art, science and ideas'.¹⁶ The issue is to what extent such heritage should be considered 'national' when it comes to the elements that are relevant to family law. Pierre Legrand and many others clearly perceive the 'cultureness' of law from a national perspective.¹⁷ Laurence Friedman, for instance, has extensively explored the concept of 'legal culture' and tends to believe that each country has its unique particular culture.¹⁸

1.1. Are national family cultures internally homogeneous?

The first relevant issue is to what extent the national cultures within Europe are internally homogenous. It has rightly been noted that the culture of a given country 'may be understood as a vast diversity of overlapping cultures; some relatively local, some, more universal'.¹⁹ Laurence Friedman speaks in this respect of 'a dazzling array of cultures' within a single culture.²⁰ One of the important points of distinction between these sub-cultures is their ideological affiliation. Thus, Friedman delineates the conservative culture and the liberal culture and 'all sorts of variants and subgroups' between them.²¹

This internal cultural diversity is especially manifest in family ideology and the discourse on family legislation. Ever since the Enlightenment, an ideological conservative/progressive discord has divided political life in Europe. All ideological trends since the Enlightenment, such as the Restoration, nineteenth century liberalism, socialism, feminism etc., are of a pan-European nature. All these trends generated their own sets of values with regard to family and family law. The corresponding progressive-conservative dichotomy does not coincide with State boundaries, but is instead prevalent in every European country. This does not refer to the growing multiculturalism resulting from immigration from non-European countries.²² What is meant is that the innate population in each particular European country is split into various different 'cultures' that are affiliated to corresponding ideologies. A clear example is France. Max Rheinstein noticed that since the 1789 Revolution, France has been split up into '*les deux Frances*', a progressive France and a conservative France, and has shown how much the subsequent history of French family law has been affected by the struggle between those two camps.²³ Describing the 1975 reform of French divorce law, Mary Ann Glendon concludes that at the end of the twentieth century French

16 S. Hicks, 'A Model of Society for the Comparative Study of Law', in *Monismus oder Pluralismus der Rechtskulturen?* Proceedings of the 13th World Congress, *Rechtstheorie*, 1997, p. 215.

17 Legrand speaks in this sense of the 'Frenchness' of French law. P. Legrand, *Fragments on Law-as-Culture*, 1999, p. 5.

18 L. Friedman, *The Legal System: A Social Science Perspective*, 1975, p. 199.

19 R. Cotterrell, 'The Concept of Legal Culture', in D. Nelken (ed.), *Comparing Legal Cultures*, 1997, p. 20.

20 L. Friedman, *The Republic of Choice: Law, Authority and Culture*, 1990, p. 213.

21 L. Friedman, *Total Justice*, 1985, p. 98.

22 On this and other aspects of multiculturalism see: E. Örüçü, *The Enigma of Comparative Law. Variations on a Theme for the Twenty-first Century*, 2004, pp. 123-132.

23 M. Rheinstein, *Marriage Stability, Divorce, and the Law*, 1972, p. 195.

society was still divided into the same '*les deux Frances*'.²⁴ Italy is also a good example. As Valerio Pocar and Paola Ronfani have stated: 'It is important to remember that Italy today still presents major contrasts in culture and daily usage between industrialized zones and those with a predominantly agricultural economy, between town and country, between North and South. As result there are many different family structures, which cannot be integrated into a single abstract model. The same consideration applies to the whole discourse on family legislation.'²⁵

Everywhere in Europe, the modernity of family patterns and family culture differs greatly from one social environment to another. The ideas that a highly educated, urban family of young professionals have about family and family law, differ significantly from the corresponding ideas of a rural family of middle-aged traditional farmers in any European country, be it Italy, Sweden, Malta or The Netherlands. Franz Rothenbacher concisely labelled this phenomenon 'the contemporaneity of the noncontemporaneous'.²⁶ Each country has, of course, a predominant ideology regarding family law matters, which is generally the ideas of the majority of the population or the *élites dirigeante*.²⁷ Thus the pertinent family law is either a reflection of the predominant values of the majority, or a compromise between the values of the various groups.

Sometimes the ongoing struggle between the conservative and progressive 'cultures' in the field of family law reaches the point of ideological confrontation. The Irish and Italian divorce referendums are good illustrations of this phenomenon.²⁸ The history of family law reform shows that most confrontations finally result in compromise legislation. Only every now and then is one side able to clearly overpower the other. For example, the conservatives did manage to turn back the clock with the abolition of divorce in France after the Restoration in 1816 and in Spain under Franco in 1939. More often it is the progressive side that manages to achieve a certain breakthrough, for example with the introduction of divorce on demand in Sweden and Spain, and same-sex marriage in The Netherlands, Belgium and Spain.

It is worth noting that there is an objective difference between 'conservative' and 'progressive' family law that is relevant here. Family law built upon a conservative 'culture' is often rather restrictive. Population groups representing minority 'cultures' are also subjected to the restrictions of that law, although they do not share its underlying convictions. A good example is the first Irish divorce referendum of 1986, when 63.5% of the electorate voted against the introduction of divorce and 36.5% voted in favour.²⁹ As the legal possibility to obtain a divorce does not compel anyone to divorce, the result of the referendum meant that the majority of the Irish population denied not only themselves, but also the dissenting minority the right to dissolve their marriage. Therefore, these minorities often have the feeling that their rights are being infringed upon in an undemocratic manner.³⁰ Such is also the in the infamous *Johnston* case, where the plaintiffs maintained that the impossibility of obtaining a divorce in Ireland infringed upon their right to family life and the right to marry – protected under Articles 8 and 12 of the

24 M.A. Glendon, 'The French Divorce Reform Law of 1976', 1976 *The American Journal of Comparative Law*, p. 201.

25 V. Pocar & P. Ronfani, 'Family Law in Italy: Legislative Innovations and Social Change', 1978 *Law and Society Review*, no. 4, p. 629.

26 F. Rothenbacher, 'Social Change in Europe and its Impact on Family Structures', in J. Eekelaar & T. Nhlapo, *The Changing Family: International Perspectives on the Family and Family Law*, 1998, p. 21.

27 I am indebted to Esin Örüçü for this term. See her E. Örüçü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition. Report for the Netherlands Comparative Law Association*, 1999, p. 86.

28 See for instance: M. Dillon, *Debating Divorce. Moral Conflict in Ireland*, 1993.

29 C. James, 'Cead Mile Failte. Ireland Welcomes Divorce: The 1995 Irish Divorce Referendum and the Family (Divorce) Act of 1996', 1997 *Duke Journal of Comparative and International Law* 8, no. 1, p. 175.

30 As Will Kymlicka has noted, 'the state unavoidably promotes certain cultural identities, and thereby disadvantages others'. W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 1995, p. 108.

European Convention on Human Rights.³¹ Family law built upon a progressive ‘culture’, however, is generally more permissive. This means that cultural groups representing a more conservative ideology are left enough room to arrange their family life in their own way. They have, of course, to accept the existence of permissive legislation, which is sometimes met with difficulty. For instance, not everyone in The Netherlands was happy with the opening of civil marriage to same-sex couples, as some felt that this also involved the deterioration of ‘their marriage’.³² Still, providing more options for everyone is a relevant advantage of permissive law above restrictive law in this ‘multicultural’ context.

1.2. The pan-European character of national conservative and progressive ‘subcultures’

If one accepts that the culture of each particular country is not internally homogeneous, the question arises to what extent the subcultures, in which national cultures are divided, are unique to the countries concerned. Analysing family law history, allows one to draw the conclusion that ever since the Enlightenment Europe has been split by the ideological discord between the ‘progressive’ camp (seeking modernisation of family law under the influence of the ideas of the Enlightenment), and the ‘conservative’ camp (opposing this modernisation in the name of ‘traditional’ family values).³³ The ‘subcultures’ relevant to family ideology and law generally correspond with this divide. Both the ‘conservative’ and ‘progressive’ family ideologies are clearly of a pan-European nature, since they both have their own rank and file in each European country. Sometimes this is a majority, sometimes a tiny stratum. The countries with modern family laws also have population groups with a conservative family ‘culture’ and the countries with conservative family laws always have population groups that represent the most modern views on family life. Laurence Friedman notices that adherents of specific attitudes ‘tend to cohere, to hang together, to form clusters of related attitudes’.³⁴ The members of the affiliated cultural groups understand each other across the borders, often looking abroad to support their ideas, and they repeatedly call on the European courts to adjudicate their confrontations with their compatriot opponents.

Thus, the elements of national culture that are relevant to family law are, in general, anything but unique. On the other hand, as the influence of different (sub)cultures varies from country to country,³⁵ national differences in prevailing family ideology and law certainly cannot be disregarded. Yet, it seems clear that in the field of family ideology and law there are few unique national cultures, but instead pan-European conservative and progressive cultures, and a wealth of variety in between. There are of course all kinds of national peculiarities that contribute to the rich cultural, ideological and political fabric that is Europe, but their significance as a determinant of family policy and law pales into insignificance in light of the dominance of pan-European conservative and progressive ideological trends.

31 See: *Johnston and others v. Ireland*, ECtHR, Judgment of 18 December 1986, Series A, No. 112, and the dissenting opinion of Judge De Mayer.

32 M. van Mourik, ‘Wettelijke en contractuele vormgeving van affectieve relaties,’ in *Het familierecht in het perspectief van de 21^e eeuw*, 1999, pp. 67-68.

33 It is worth noting here that in domestic debates the cultural constraints argument is by far more popular in the ‘conservative’ camp. Rodolfo Sacco has mentioned that ‘The ideology of cultural self-sufficiency is merely the name given to the ideology of cultural delay’. R. Sacco, ‘Diversity and Uniformity in the Law’, 2001 *The American Journal of Comparative Law*, p. 177.

34 L. Friedman, *Total Justice*, 1985, p. 98.

35 Roger Cotterrell has rightly noticed that legal ideology is more strongly linked with social power than other elements of legal culture. Cotterrell, *supra* note 19, p. 23.

2. Is family law embedded in unique national legal culture?

If the other elements of national culture that are relevant to family law are not, or at least not predominantly, of a unique national character, the question arises whether perhaps *legal* culture is. The proponents of the cultural constraints argument seldom directly refer to the embedment of family law in culture in general. It more often suggested that family laws are embedded in one particular element of culture, namely legal culture. Thus, Pierre Legrand speaks of the embedment of law in a subjective component of legal culture: legal *mentalité*. Marie-Thérèse Meulders-Klein suggests that family law constitutes the hard core of any legal culture.³⁶ This reference to legal, rather than general culture, allows the suggestion that, while general family ‘cultures’ are not unique to particular European states, the legal cultures are. This possibility calls for some inquiry into the notion of legal culture.

2.1. What is legal culture? Deep and surface levels of legal cultures

Legal culture is a particular element of general culture: a sort of translation of general culture into the language of legal concepts, techniques and ideas. The issue of legal culture has received substantial attention recently and a lot of literature has been devoted to the topic.³⁷ I will confine myself to only a few remarks. As was mentioned above, the concept of legal culture has been extensively explored in various works of Laurence Friedman. Friedman defines legal culture as ‘ideas, attitudes, values and opinions about law, the legal system, and legal institutions of some given population’.³⁸ Within a legal culture Friedman primarily distinguishes between the professional and the common (lay) legal culture.³⁹ Mark van Hoecke and Mark Warrington introduce the concept of ‘paradigm’ in order to describe the hard core of legal cultures more specifically.⁴⁰ To such ‘paradigmatical’ aspects of legal culture they attribute: (1) a concept of law; (2) a theory of valid legal sources; (3) a methodology of law; (4) a theory of argumentation; (5) a theory of legitimation of law; and (6) a common basic ideology.⁴¹

Within those paradigms of legal culture, Van Hoecke and Warrington distinguish between different levels. The ‘common ideology, common moral convictions form the *deep* level, which eventually comes to dominate the other levels.’⁴² On the basis of this differentiation they further distinguish between differences amongst legal cultures, which manifest themselves at the surface and the deeper levels. The differences on the deep moral and ideological level are of paramount importance. The differences on the surface level (for example legal rules, legal concepts and legal techniques) are less important.⁴³ It is justly pointed out that ‘once the moral choices have been made, legal techniques are used in such a way as to reach the desired result.’⁴⁴ In a similar way Hugh Collins remarks with regard to the contemporary harmonisation activities, that technical aspects of the differences in legal cultures are relatively easy to reconcile, while overcoming differences, based on dissimilar moral values ‘encounter[s] a general tension between the project

36 M.-T. Meulders-Klein, ‘Towards a European Civil Code of Family Law? Ends and Means’, in K. Boele-Woelki, (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, 2003, p. 109.

37 For an overview see: D. Nelken, ‘Comparing Legal Cultures: An Introduction’, in D. Nelken, (ed.), *Comparing Legal Cultures*, 1997, pp. 1-9.

38 L. Friedman, ‘Some Thoughts on Comparative Legal Culture’, in D. Clark (ed.), *Comparative and Private International Law. Essays in Honour of J. H. Merryman on his Seventieth Birthday*, 1990, p. 53.

39 L. Friedman, *The Legal System: A Social Science Perspective*, 1975, p. 223.

40 M. van Hoecke & M. Warrington, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model For Comparative Law,’ 1998 *International and Comparative Law Quarterly*, p. 513.

41 *Ibid.*, pp. 514-515.

42 *Ibid.*, p. 519.

43 *Ibid.*

44 *Ibid.*

of harmonisation and respect for cultural diversity in Europe.⁴⁵ This proposition strongly applies to family law, where almost every rule ‘represent[s] a symbolic endorsement of particular moral ideas.’⁴⁶ The emphasis on the political and ideological aspects of legal culture laid by Van Hoecke, Warrington and Collins is narrowly related to the idea of the embedment of family law in the political aspects of society, put forward by Otto Kahn-Freund and David Bradley and amply supported by the results of the examinations in my aforementioned book.⁴⁷

2.2. The legal cultures of common law and civil law

According to Pierre Legrand, the most important differences between the legal cultures in Europe lie across the axes of the common/civil law dichotomy.⁴⁸ Legrand postulates an irreconcilable discord between the civil law and the common law *mentalités*.⁴⁹ He suggests that ‘there exist[s] both [a] common law and [a] civil law *mentalité* – two different ways of thinking about the law, about what it is to have knowledge of law and about the role of law in society’.⁵⁰ Legrand presents the history of the relationship between common and civil law systems as a kind of perpetual ‘epistemological war’.⁵¹ Consequently, he resolutely denies any possibility of the evolution of common and civil law cultures towards each other and claims that even evident examples of growing proximity between legal solutions provided in civil and common law systems should be dismissed as illusions based on a fallacious reduction of law to legal rules.⁵²

In contrast to Legrand’s contentions, several authors⁵³ assert that convergence of civil and common law systems, albeit gradual and patchy,⁵⁴ has taken place on various levels. Basil Markesinis notes convergence on both the functional (similar solutions to similar problems) and the formal level (for example, convergence in the sources law; and a growing rapprochement of judicial views).⁵⁵ My research has shown that there is not much difference between the common law and civil law rules on marriage, divorce, cohabitation, the position of extramarital children, and even matrimonial property.⁵⁶ John Merryman has accurately pointed out that similarity of rules alone ‘is in most cases an unreliable indicator of convergence or divergence of legal systems.’⁵⁷ Yet, even he admits that similar rules often provide ‘outward evidence of a deeper legal similarity’. A ‘more convincing measure of convergence’ has to be found, according to Merryman, ‘in the extent to which legal systems in Civil and Common Law nations play out the fundamental values of Western culture.’⁵⁸ Application of this criterion reveals that the common

45 H. Collins, ‘European Private Law and the Cultural Identity of States’, 1995 *European Review of Private Law*, p. 363.

46 *Ibid.*

47 See my *Harmonisation of Family Law in Europe: A Historical Perspective*, 2006.

48 L. Moccia has traced the historical routes of this ‘mental obsession with presumed division between Civil and Common law’ in the ‘oversimplified as well as nationalistically biased’ attitude that emerged, in L. Moccia, ‘Historical Overview of the Origins and Attitudes of Comparative Law’, in B. Witte & C. de Forder (eds.), *The common law of Europe and the future of legal education*, 1992, pp. 611-619.

49 P. Legrand, ‘European Legal Systems Are Not Converging’, 1996 *International and Comparative Law Quarterly*, p. 62.

50 P. Legrand, ‘Against a European Civil Code’, 1997 *Modern Law Review*, p. 45.

51 For which he received a well-deserved acquisition of selective and tendentious ‘rétrodiction’ of legal history. A. Chamboredon, ‘The Debate on a European Civil Code: For an “Open Texture”’, in M. van Hoecke & F. Ost (eds.), *The Harmonisation of European Private Law*, 2000, p. 68.

52 P. Legrand, *Fragments on Law-as-Culture*, 1999, pp. 83-84.

53 E.g. X. Lewis, ‘The Europeanisation of the Common Law’, in R. Jagtenberg *et al.* (eds.), *Transfrontier Mobility of Law*, 1995, pp. 47-61; R. Zimmermann, ‘Roman Law and European Legal Unity’, in A. Hartkamp *et al.* (eds.), *Towards a European Civil Code*, 1998, pp. 34-35; J. Merryman, ‘On the Convergence (and Divergence) of Civil Law and Common Law’, in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe*, 1978, pp. 195-233; B. Markesinis (ed.), *The Gradual Convergence. Foreign Ideas Foreign Influences and English Law on the Eve of the 21st Century*, 1994.

54 B. Markesinis, ‘Learning from Europe and Learning in Europe’, in B. Markesinis (ed.), *The Gradual Convergence. Foreign Ideas Foreign Influences and English Law on the Eve of the 21st Century*, 1994, p. 30.

55 *Ibid.*

56 See M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective*, 2006.

57 Merryman, *supra* note 53, p. 230.

58 *Ibid.*, pp. 232-233.

and civil law families ‘are moving along parallel roads, towards the same destination.’⁵⁹ Mark van Hoecke and Mark Warrington conclude that ‘there are still differences between common law and civil law, but they are very close to a point where there will no longer be *paradigmatical* differences. What will ultimately remain is some degree of difference, although not of a fundamental nature.’⁶⁰

These conclusions apply all the more to family law. My research has made it clear that there are no more differences on the level of legal ideology in respect of family laws, between the common and civil law cultures than between the civil law countries internally.⁶¹ If one takes as a starting point that legal ideology is the most important element in determining the differences and similarities between legal cultures, one must conclude that the alleged fundamental difference between common and civil law legal cultures, whatever its merits for other fields of law, does not apply to family law. The history of family law clearly shows that the choices that were made in the context of family law reforms, and the political debates surrounding these reforms, have always been and still very much are the same on the continent as on the British Isles. Moreover, not only the ideological, but also the formal elements of legal culture in family law are no different in common and civil law countries. The explanation for this is that the bulk of family law in the whole of Western Europe, with the only notable exception being matrimonial property law, is embedded in a common legal past: the medieval uniform canon law. The two systems even share the same conceptual language. For a common law lawyer terms like ‘separation of bed and board’, ‘annulment’ or ‘illegitimate child’ sound as familiar as for his continental colleague. There is not even much difference with respect to the legal sources, as even in the common law countries family law is mainly an area of codified law.⁶²

2.3. Conclusion

In the context of the cultural constraints argument, only differences in legal culture on the ‘deep’ level of legal ideology and moral convictions could be truly relevant, as differences on the ‘surface’ level of legal rules, concepts and techniques are relatively easy to overcome. Studying the history of family law allows one to draw the conclusion that with respect to family law, the general similarity at the level of ideologies and morals between all countries in Europe is overwhelming. Due to the shared common past stemming from the application of medieval uniform canon law, the differences on the ‘surface’ level are also less than in any other field of private law. It is clear that the conclusions presented above in relation to the alleged fundamental differences between the legal cultures of common law and civil law can also apply to the civil law countries when compared to each other. The conclusion of this brief excursion into legal culture is therefore that with regards family law, legal cultures in Europe do not possess a unique national character, at least not in such a way that this should affect the conclusion previously drawn with regards the other elements of national culture relevant to family law, namely that in the field of family ideology and law, there is so such thing as a unique national culture, but rather a pan-European conservative and a pan-European progressive culture, and a plethora of variety in between.

⁵⁹ *Ibid.*, p. 233.

⁶⁰ Van Hoecke & Warrington, *supra* note 40, p. 501.

⁶¹ See M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective*, 2006.

⁶² Kahn-Freund, *supra* note 2, p. 150.

3. Is there a common European family culture?

The conclusion remains that the elements of national culture that are relevant to family law are generally anything but unique. Modernisation goes on everywhere in Europe, albeit sometimes at a very different pace, and both the driving and opposing forces that shape this evolution are of a pan-European character. Does this mean that we can speak of a common European family culture?

The proponents of the cultural constraints argument firmly postulate the uniqueness of national cultures, while their opponents tend to see the particularities of the national cultures within Europe within the broader context of a common European culture. Even Laurence Friedman, who generally believes in the uniqueness of national cultures,⁶³ acknowledges the existence of such general phenomenon as modern culture or the culture of modernity.⁶⁴ Although there is no definite agreement concerning the principal characteristics of the common European culture, some characteristics thereof are more or less unambiguous. Such common features include, for instance, individualism and rationalism,⁶⁵ personalism and intellectualism,⁶⁶ rights-consciousness and dissolution of traditional authority,⁶⁷ and respect for human rights.

However, these are only very general characteristics. They are not enough to constitute a general ideological consensus on particular issues of family law. As we have seen, on some of those issues consensus does exist. The best examples are the above mentioned common ideological standpoints on the equality of spouses and of children born in and outside of marriage. Yet, it is abundantly clear that on many other issues such consensus does not exist. The consensus-forming potential of the European human rights instruments and courts is limited by the fact that they generally tend to go no further than the level of consensus that already exists among the Member States. Therefore there is not much hope that in the near future a shared notion of European human rights will form a basis of common ideology for the whole of family law.

The point is that the pan-European character of family law culture and ideology is most evident if examined from a historical perspective, removed from any particular point in time. However, if one considers the family law culture and ideology of the various countries of Europe as they stand at a certain point in time only, it is the differences, rather than the similarities, that tend to be most prominent. It was concluded above that these are caused merely by the differences in the pace and profundity of the modernisation of family law that takes place everywhere in Europe. Yet it is clear that in the context of an evaluation of the cultural constraints argument, the national differences in prevailing family culture and ideology that exist at present, and in one form or another will most probably continue, and thus cannot be disregarded altogether. It is therefore very plausible to speak of a common European family culture, but not in the sense that the cultural constraints argument could be dismissed altogether because in reality there are no relevant differences among the national family cultures and ideologies in Europe. Such differences are definitely present, and the analysis of convergence tendencies in the preceding sections suggests that for the foreseeable future, they will not disappear.

63 L. Friedman, *The Legal System: A Social Science Perspective*, 1975, p. 199.

64 L. Friedman, *The Republic of Choice: Law, Authority and Culture*, 1990, pp. 198-199.

65 Van Hoecke & Warrington, *supra* note 40, p. 503.

66 F. Wieacker, 'Foundations of European Legal Culture', 1990 *The American Journal of Comparative Law*, pp. 1-29.

67 L. Friedman, 'Some Thoughts on Comparative Legal Culture', in D. Clark (ed.), *Comparative and Private International Law. Essays in Honour of J. H. Merryman on his Seventieth Birthday*, 1990, p. 57.

4. Conclusion

It is clear that the core assumption of the cultural constraints argument – the alleged embedment of family laws in unique and unchangeable national cultures – cannot be maintained. History plainly shows that in the field of family ideology and law one cannot really talk of unique national cultures, but rather of a pan-European culture, which is not homogeneous but an amalgamation of pan-European ‘conservative’ and pan-European ‘progressive’ cultures. The relative influence of these two opposing family ‘cultures’ varies from country to country and from time to time. Examinations of history of family law made in my aforementioned study suggest that there are the differences in the balance of political power between ‘progressive’ and ‘conservative’ forces, rather than national culture that determines the pertinent family laws.

The cultural constraints argument cannot be saved by the suggestion that national politics is just an element of national culture; this is not because such classification is impossible in principle. Although a more precise description of the relationship between culture and politics would of course depend on the adopted definition of both concepts, it seems obvious that national culture can be considered an important determinant of the political affairs of a country, and perhaps the same can be said of the reverse relationship. The cultural constraints argument cannot be saved by such reasoning, because it is not so much the element of ‘culture’ that is essential to it, but the elements of uniqueness and unchangeability. These are the elements that lie at the heart of the assumption that convergence and deliberate harmonisation of national family laws is impossible, not the contention that family law is determined by culture. As we have seen, the political factor that is the main determinant of the evolution of national family law is the balance of power between the local adherents of predominantly pan-European ‘progressive’ and ‘conservative’ family ideology. This balance of political power is obviously neither unique nor unchangeable. On the contrary, there are few things so variable as the political vicissitudes of a country and the outcome of democratic elections. Although one could of course say that a particular country generally has a more or less continuous ‘conservative’ or ‘progressive’ political character (for instance, when comparing Malta to Sweden or Ireland to The Netherlands), the example of Spain opening civil marriage to same-sex couples soon after the electoral victory of the social-democrats under Rodríguez Zapatero is a clear example that the political determinants of the evolution of family law are very changeable indeed. One never knows how long such a statement will remain valid when it comes to family law.

All things considered, the conclusion can be none other than that the cultural constraints argument is beyond redemption. Its core assumptions cannot be upheld. Family law is not so much embedded in unique national culture and history, but rather in a pan-European culture and history. Pertinent national family laws are determined by political, rather than cultural factors, and these are fluid. Every now and then family laws do converge spontaneously. However, it remains to be seen what all this means for the deliberate harmonisation of family law.